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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944

ALLEN BRADLEY COMPANY, ALLIS-CHALMERS MANUFACTURING COMPANY, CLARK CONTROLLER COMPANY, COLT'S PATENT FIRE ARMS MANUFACTURING COMPANY, CUTLER-HAMMER, INC., THE ELECTRIC CONTROLLER & MANUFACTURING COMPANY, GENERAL ELECTRIC COMPANY, MONITOR CONTROLLER COMPANY, SQUARE D COMPANY, TRUMBULL ELECTRIC MANUFACTURING COMPANY and WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY,

*Petitioners,*

against

LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, BERT KIRKMAN, individually and as President thereof, WILLIAM BECK, individually and as Treasurer thereof, HUGH MORGAN, individually and as Assistant Business Manager thereof, GEORGE W. WHITFORD, individually and as Recording Secretary thereof, JACOB S. SOLOMON, individually and as Business Agent thereof, and GERALD DUFFY, individually and as an Agent thereof,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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# INDEX


| | PAGE |
|---|---|
| Parties and History of Proceeding | 3 |
| Jurisdiction | 4 |
| Statement of Facts as Found | 4 |
| Questions Presented | 10 |
| Reasons in Support of Petition | 10 |
| Fundamental Significance | 12 |
| Conclusion | 14 |


CITATIONS

*Cases*


| | |
|---|---|
| Allen Bradley Company, et al. v. Local #3, et al. (Special Master's Opinion), 41 F. Supp. 727 | 3 |
| Allen Bradley Company, et al. v. Local #3, et al. (District Court on motion to confirm Special Master's Report), 51 F. Supp. 36 | 4 |
| Apex Hosiery Company v. Leader, 310 U. S. 469 | 11 |
| Columbia River Packers Association v. Hinton, 315 U. S. 143 | 11 |
| Lumber Products Association, Inc. v. United States, 9 Cir., 144 F. (2d) 546 | 10 |
| United Electrical Radio and Machine Workers of America v. International Brotherhood of Electrical Workers, 2 Cir., 115 F. (2d) 488 | 11 |
| United States v. Brims, 272 U. S. 549 | 10 |
| United States v. Hutcheson, 312 U. S. 219 | 10 |


*Statutes*


| | |
|---|---|
| Declaratory Judgment Act, Judicial Code, Sec. 274 (d) (28 U. S. C. A. § 400) | 3 |
| Judicial Code, Sec. 240 (a) (28 U. S. C. A. § 347) | 4 |
| National Labor Relations Act (29 U. S. C. A. § 151) | 11 |
| Sherman Anti-Trust Law (15 U. S. C. A. § 1) | 10 |

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*Respondents.*

COME NOW your petitioners above named by Walter Gordon Merritt, their counsel, and move this Honorable Court that it shall, by certiorari or other proper process directed to the Honorable United States Circuit Court of Appeals for the Second Circuit, require said Court to cer-

tify and remove to this Court, for its review and determination, a certain cause lately pending in said Court, wherein your petitioners were plaintiffs-appellees and the respondents were defendants-appellants, and to that end your petitioners now tender herewith their petition with a certified copy of the record in said cause.

WALTER GORDON MERRITT,
*Counsel for Petitioners.*

Dated at New York City,
November 22nd, 1944.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Your petitioners respectfully show to this Court:

### Parties and History of the Proceedings.

1. Petitioners are corporations organized and existing under the laws of some State of the United States.

2. Respondents are Local No. 3, International Brotherhood of Electrical Workers, a voluntary association of workingmen employed in the electrical industry in the City of New York and vicinity, and certain individual officers or representatives of said Union.

3. This action was commenced in the United States District Court, Southern District of New York, on December 9, 1935, seeking a declaratory judgment pursuant to Sec. 274 (d) of the Judicial Code (28 U. S. C. A. § 400) declaring certain activities of the defendants to be a violation of the federal anti-trust laws and asking for an injunction as further relief under said section.

4. Pursuant to stipulation, the case was referred on July 1, 1937, by order of the District Court, to John Kirkland Clark, Esq., as Special Master, to hear and determine all issues of law and fact therein and report to the Court. In October, 1937, the parties proceeded to trial before the Special Master, which trial, with adjournments and intermissions, was concluded on March 7th, 1940. It involved over 200 sessions and 25,000 pages of testimony, exclusive of 1,700 exhibits. The Special Master filed his opinion on October 2nd, 1941 (pp. 80-134) (reported 41 F. Supp. 727), and filed his findings of fact and conclusions of law on November 23rd, 1942, holding for the plaintiffs (p. 135).

Hearings before Honorable FRANCIS G. CAFFEY, Judge of the United States District Court, Southern District of New York, on motion to confirm said report and on defendants' objections thereto occupied 22 days, between March 1, 1943 and June 10, 1943. Said findings and conclusions of law were adopted by the Court with some minor modifications (pp. 135-154) and the opinion of the District Court in petitioners' favor was rendered orally on June 10, 1943 (pp. 155-173) (51 F. Supp. 36). On September 23, 1943, the final decree and declaratory judgment was entered (pp. 173-295), and on September 24, 1943 the writ of injunction issued (pp. 296-300).

5. The defendants thereupon filed their appeal to the United States Circuit Court of Appeals for the Second Circuit on December 14, 1943 (on the findings and conclusions without bringing up the evidence), and the appeal was heard by the said Court on May 10, 1944, which rendered its opinion on October 12, 1944, reversing the judgment and dismissing the action, SWAN, J. dissenting.

## Jurisdiction.

The jurisdiction of this Court is based on Sec. 240 (a) of the Judicial Code (28 U. S. C. A. §347) as amended by the Act of February 13, 1925.

## Statement of Facts as Found.

(References are to the numbers of the findings, pp. 175 to 286.)

There are four commercial groups involved in this trade picture:

1. Petitioners are manufacturers of electrical equipment which seek to market part of their products in New York City for installation and use in New York City build-

ings (1 to 84). Generally speaking their factories are outside of New York State and outside of the territorial jurisdiction of Local 3 (85, 96, 361), so that they cannot deal with Local 3 (85, 96) in respect to labor relations, but the largest of them have collective bargaining agreements with other unions (4, 20, 21, 32, 38, 60, 68, 71, 73).

2. Respondent, Local Union No. 3, with jurisdiction limited to New York City and vicinity, and a membership of some 15,000, comprises (a) employees of union electrical contractors, who install electrical equipment in buildings, and (b) employees of local manufacturers, who produce electrical equipment for buildings (86-139).

Local 3 is a closed union and the right to become a member through apprenticeship is entailed for sons and brothers of existing members (125). It is highly autocratic in its government (106-124).

3. Local Union Electrical Manufacturers, competitors of petitioners for the New York City market, operate in New York City under closed shop agreements with Local 3. These manufacturers—or at least some of them—unionized upon condition that Local 3, through its control of installation work, would "deliver" the New York market to them and prevent outside competition (329, 168-72). Concerning this group, the majority opinion of the Circuit Court of Appeals says (p. 309):

> "In return for a closed shop agreement calling for higher wages and shorter hours for employees, however, Local 3 promised these local companies an exclusive market for switchboards within the city, so that they could name their own prices to offset production costs."

(See also findings 184-7, 257, 265, 300-2, 314, 349-61, 364-6.)

4. Local Union Electrical Contractors, herein called "contractors," operating under closed shop agreements

with Local 3, purchase and install electrical equipment in New York City. Local No. 3 permits no other electrical contractors to do substantial work in New York City (188-227) and completely dominates and controls the contractors (217, 222-7). Local 3 also determines which contractors may operate as union contractors (219-26) "by refusing to admit certain additional contractors within the group where it would result in competition with those already in it" (219). Again there is a closed ring.

The Trade Affected is the sale by the petitioners to the contractors in New York City of lighting fixtures, low tension switchboards, signalling equipment, panel boxes, control equipment, switches (other than toggle), high tension cables, armored BX cable, wire, outlet boxes, branch circuits and feeders (345, 228-30), herein called "Electrical Equipment." The annual volume of such purchases by said contractors is about $10,000,000 (229).

The Means employed to destroy petitioners' commerce is a boycott made effective through the monopolistic control maintained by Local 3 and the contractors over electrical installation work involving the use of products of the types which are boycotted. This boycott is carried on by Local 3 in combination with the contractors—the purchasers and installers of said products—and local manufacturers, producers of such products formerly competing with petitioners (346). All electrical equipment is required to be manufactured, purchased and handled and finally installed by members of this tripartite alliance. Adherence to these restrictions is secured through the mixed inducements of commercial rewards and punishments (346, 353, 356, 358, 181, 230, 245, 257, 300, 302, 333-41, 154, 219-20).

Summarizing this situation the Circuit Court of Appeals said (p. 311):

> "All in all, the situation disclosed by the findings is that of an entire industry in a local area,

quite dominated and closed to outsiders by a powerful union, whose members receive as a result exceedingly higher wages, shorter working hours, and improved working conditions, and whose copartners—the local manufacturers and contractors—also gain by the greater profits achieved through the stifling of competition."

Finding 353, among many other findings states the purpose and effect of the combination:

> "The combination and conspiracy hereinbefore described was intended to and did give the local union manufacturers power to control the market price of their products as a result of their monopoly and was intended to and did give the union contractors exclusive purchasing rights to all electrical equipment for installation and contracts involving larger sums of money wherewith to add to their profits."

While it appears that the contractors dare not resist the union, it also is found as a fact that they actively and affirmatively participated in the boycott for their profit (333-41).

A written agreement, executed in March, 1935, to settle a building trades strike during the construction of Rockefeller Center in New York City, enlisted others than the electrical industry in the boycott. The parties were Local 3, The New York Electrical Contractors Association, Association of Contracting Plumbers of the City of New York, and Heating, Piping and Air-Conditioning Contractors, N. Y. C. Assn., Inc., and Sprinkler Contractors, and the agreement prescribed that certain electrical control equipment—of a type which did not interest the local manufacturers—should be assembled and wired by the contractor on the job. It prevented interstate commerce in the finished product and transferred this business of building this equipment from the petitioners' factories in other

states to the contractors on the job site (275-291). It trebled the cost (291-293), and undermined efficiency, economy and fire insurance protection (291-307). In two jobs alone the extra costs of disassembling and unwiring and reassembling and rewiring were respectively $17,500 and $5,800 (293).

The findings also show in detail the extent to which interstate commerce has been restrained and destroyed and prices increased in respect to lighting fixtures (231-57), switchboards (168-87), switches (263-6), control equipment (267-307), signalling apparatus (308-14), wire and cable (315-20) and other lines of equipment (321-8). The cost of wiring and assembling lighting fixtures has increased four to eight times (251).

The Westinghouse Electric & Manufacturing Company bid $56,000 for the panel boards and switchboards to be installed in the Ten Eyck Low Cost Housing project but was informed "it could not have the job at any price, because the product did not bear the union label," and the order went to a local union manufacturer for $110,934 (183). Unlabelled products "cannot be sold at any practical price" (187).

Several findings deal specifically with the increased prices imposed on the public:

> "Some union manufacturers of outlet boxes and switches located in New York City, and working under agreement with Local No. 3, issued from time to time two different price lists for the same products, one containing prices for their products without the union label for the solicitation of business in unprotected areas where free and open competition must be met, and another containing a price list on a different colored sheet, covering the same products, made by the same employees in the same factory, with the union label, for the solicitation of business in the protected area in New York

City and the Metropolitan area, and in some instances, the prices for the protected area have been more than double the prices charged for the same items in the unprotected area" (349). (See also 266.)

"In one case in 1935, a supply house charged a union electrical contractor for a meter pan, manufactured by a union electrical manufacturer with a union label thereon the sum of $5.40 which sum was more than the basic price of the article itself without the union label thereon, which was $2.40" (350).

"In most cases, the prices charged the New York City union electrical contractors for electrical equipment and material obtained from the local union manufacturers have been, and at the time of the trial were, materially higher than the prices at which such contractors could purchase similar or identical equipment and material from the plaintiffs or from other manufacturers not employing members of Local No. 3" (351).

"Said higher prices charged by said local union manufacturers for the sale of products to be used in New York City are due to the barriers which the boycott practices of Local No. 3, aided, abetted and participated in by the local union electrical contractors and local union electrical manufacturers, have established to prevent manufacturers outside of the City of New York from competing with local union manufacturers in the City of New York for the sale of products to be used in the City of New York, and to create and maintain a monopoly in the Metropolitan Area for electrical products manufactured in factories employing members of Local No. 3" (352).

The respondents were not seeking in any way to bring about any change of conditions of employment in the petitioners' factories (360-1, 368-9). The ban on petitioners' products is an absolute ban and there is nothing petitioners

can do, by way of changing conditions of employment, to avoid it (360-1). The subject matter of this suit does not involve or grow out of a labor dispute (363, 367-9).

The petitioners have been suffering, and are threatened with, irreparable damage (347-8).

## Questions Presented.

The petitioners desire to have this Court review the question as to whether or not the trade combination described in the findings of fact is in violation of the Sherman Anti-Trust Law, 15 U. S. C. A., § 1, *et seq.*, and laws amendatory thereof, and if in violation thereof, whether an injunction should issue.

## Reasons in Support of Petition.

1. The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *Lumber Products Association, Inc.* v. *United States,* decided August 23, 1944, 144 F. (2d) 546. In the case at bar the Special Master, the District Judge, and one of three Circuit Court Judges have decided in favor of the petitioners, and two Circuit Court Judges have decided in favor of the respondents.

2. A majority of the Circuit Court of Appeals has decided the Federal question involved in a way which conflicts with the applicable decisions of this Court. The majority opinion found it necessary to state, in effect, that this Court did not mean to reaffirm the case of *United States* v. *Brims,* 272 U. S. 549, and that the language of this Court in the case of *United States* v. *Hutcheson,* 312 U. S. 219, "should not be read with exacting literalness." It failed to give effect to the principles laid down by this Court that the exemptions granted labor under the anti-trust laws do not apply when labor is dealing with non-

labor objectives (*Apex Hosiery Company* v. *Leader*, 310 U. S. 469; *Columbia River Packers Association* v. *Hinton*, 315 U. S. 143) or when it combines with non-labor groups (*United States* v. *Hutcheson, supra*).

On the contrary, the majority opinion of the Circuit Court of Appeals in the case at bar says (p. 326):

> "On this basis it would follow that here the activities which cannot be forbidden to Local 3 acting by itself are not to be interdicted because other groups join with them to the same end."

3. Congress has frequently exercised its control over interstate commerce for the purpose of securing enforcement of both Federal and state laws. It is not to be presumed, therefore, the Congress has so exercised its control as to deprive people of their rights under another Federal act. To say that products made under union relationships required by the National Labor Relations Act shall not flow in interstate commerce,—because not made under different union relationships impossible of attainment,—deprives the journeymen who produce the banned products of their rights under the National Labor Relations Act (see *U. E. R. M. W. A.* v. *I. B. E. W.*, 2 Cir., 115 F. [2d] 488), as well as their Federal rights to produce for interstate commerce. Can it be possible, for illustration, that employers and employees in New York City may unite to prevent the importation of goods because they were manufactured in accordance with the requirements of the Fair Labor Standards Act?

4. The public injury involved is recognized in the opinion of the Circuit Court of Appeals and the fundamental significance of the principle involved calls for special discussion in this petition.

## Fundamental Significance.

One of the major purposes of our national existence, for which the Constitution was adopted, is the maintenance of a national economy free from trade barriers, and no attempt to destroy that national area of free trade should escape condemnation.

The avowed purpose of this monopoly being sectional and territorial in character—and having no relation to labor standards or class alignment—is an undisguised attempt, within its scope, to relegate the New York City market to a condition of economic isolation.

While mankind strives to raze trade barriers as between nations, and thus to enlarge the area of free trade in the cause of human betterment, these monopolists erect barriers within the very confines of the nation and thus seek the disintegration of our national economy.

Since neither city, state nor Federal government has the power by legislation to authorize the creation of such trade barriers or the allocation of territorial markets, no court should read into the Federal Anti-Trust Act a sanction for private persons so to do. Such an interpretation, we submit, would destroy the constitutionality of the Act.

If a group of citizens in New York City may bar the entry of union-made equipment coming from Philadelphia, St. Louis, Detroit or Chicago—as is undisputed in this case—these offended cities will retaliate in self-defense and the nation will be Balkanized.

Where the discrimination or restraint is based on the extraterritorial origin of the goods and not upon terms or conditions of employment, it is against any conceivable public interest to contend that a Constitutional purpose essential to our existence as a nation must be discarded for the benefit of a group of producers and workers in a single city.

Already as a stated result of the recent decision in this case, real estate agents are soliciting outside electrical industries to locate within the New York City area, on the ground that only by so doing may they enjoy the protected metropolitan market.

Such an embargo on extraterritorial products causes great public injury. It artificially promotes undesirable congestion in large cities and taxes the public by increasing living costs.

In this case labor unions—which are the exempted group under our anti-trust laws—unite with employers, who are the non-exempted group. Does the exemption extended to labor carry over to the non-labor group or do the prohibitions imposed on the non-labor group carry over to the labor group? Surely all engaged in a common enterprise must have the same standing, for otherwise equality before the law is lost and the fundamental principles of conspiracy law, visiting equal blame on all, are overthrown.

This controversy does not arise out of a labor dispute or any conflict between horizontal classes; it is a conflict between vertical and sectional segments of society. The respondents assert no controversy with the petitioners, and their relation to local employers is one of collusion and cooperation.

The boycott in this case is a dictatorial and undemocratic boycott, which denies to the public its sovereign right of choice or right of commercial suffrage, and should be distinguished from a boycott where there is a public appeal for the voluntary exercise of the force of public patronage. Journeymen and employers producing in any state, in conformity with the requirements of Federal and state law, are entitled to offer their products for sale in all states, leaving the public to decide what it wishes to buy.

## Conclusion.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of, and under the seal of, this Court to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Honorable Court a full and complete transcript of the record and all proceedings in the within cause and to stand to and abide by such order and direction as to your Honors shall seem meet, and the circumstances of the case require, and that your petitioners may have such other and further relief or remedy in the premises as to this Court may seem proper.

WALTER GORDON MERRITT,
*Counsel for Petitioners,*
40 Wall Street,
New York, N. Y.

Dated, November 22nd, 1944.